No. 92-1232

Supreme Court, U.S.
FILED
FEB 17 1993
OFFICE OF THE CL...

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

J. PAUL FORD, Warden,

Petitioner,

v.

HENRY HAMILTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

# BRIEF IN OPPOSITION

SUBMITTED BY:

Henry Hamilton

Of Counsel:

Glen M. Darbyshire
HUNTER, MACLEAN, EXLEY
& DUNN, P.C.
Post Office Box 9848
Savannah, Georgia 31412-0048
(912) 236-0261

February 17, 1993

No. 92-1232

---

IN THE
SUPREME COURT OF THE UNITED STATES

---

OCTOBER TERM, 1992

---

J. PAUL FORD, Warden,

Petitioner,

v.

HENRY HAMILTON,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

# BRIEF IN OPPOSITION

---

SUBMITTED BY:

Henry Hamilton

Of Counsel:

Glen M. Darbyshire
HUNTER, MACLEAN, EXLEY
& DUNN, P.C.
Post Office Box 9848
Savannah, Georgia 31412-0048
(912) 236-0261

February 17, 1993

## TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

STATEMENT OF THE CASE..... 1

ARGUMENT AND CITATIONS OF AUTHORITY

I. DETERMINING WHETHER JOINT REPRESENTATION WAS IMPROPERLY REQUIRED OVER TIMELY OBJECTION PRESENTS A FACT-SPECIFIC INQUIRY, AND THEREFORE ANY ATTEMPT TO FORMULATE A CONSTITUTIONALLY MANDATED TEST FOR EVERY CASE WOULD BE INAPPROPRIATE, IF NOT IMPOSSIBLE..... 14

II. EVEN IF THE COURT HELD THAT THE ACTUAL CONFLICT/ADVERSE IMPACT TEST MUST BE APPLIED IN EVERY CASE TO DETERMINE IF JOINT REPRESENTATION WAS IMPROPERLY REQUIRED, THE RESULT IN THIS CASE WOULD NOT DIFFER..... 18

III. WHETHER A COURT OF APPEALS MAY CONDITIONALLY GRANT A PETITION FOR WRIT OF HABEAS CORPUS AND REQUIRE THE COMMENCEMENT OF A RETRIAL WITHIN 90 DAYS OF THE DATE OF THE COURT'S OPINION PRESENTS AN ISSUE NOT DECIDED IN THE COURT BELOW..... 22

CONCLUSION..... 24

## TABLE OF AUTHORITIES


Cuyler v. Sullivan, 446 U.S. 335 (1980)..... 14, 18, 19, 20

Glasser v. United States, 315 U.S. 60 (1941)..... 14, 20

Holloway v. Arkansas, 435 U.S. 475 (1978)..... 14, 15, 16

Duncan v Alabama, 881 F.2d 1013 (11th Cir. 1989)..... 19

Gray v. Estelle, 616 F.2d 801 (5th Dir. 1980)..... 22

Hamilton v. State, 255 Ga. 468, 339 S.E.2d 707 (1986)..... 7

## STATEMENT OF THE CASE

The murder of Stephen Hynes occurred on May 28, 1983. Respondent was indicted for the murder on July 12, 1983. Specifically, the indictment charged respondent and his cousin, Michael Fortson, with one count of malice murder and two counts of attempted robbery of Hynes and his fiancee, Catherine Moore. The indictment listed 23 witnesses. It did not list four witnesses whose testimony provided a critical link between respondent and the murder of Stephen Hynes. These witnesses were: Calvin Fletcher, Gwendolyn Cade, James Tate, and Tony Alphabet.[1]

The trial court appointed attorney James W. Lewis to represent both Fortson and respondent. During a pretrial hearing on October 17, 1983, the court ordered the prosecutor, Michael Whaley, to produce a list of potential witnesses and persons having knowledge about the case, along with the correct address for each. The court further ordered Whaley to provide Lewis with a list of the witnesses he intended to call at least by the Thursday before the scheduled first day of trial, Monday, November 14, 1983.

Also during the pretrial hearing, the court denied a motion for severance. The motion included among its

---

[1]The opinion of the Court of Appeals below addressed only the first three of these witnesses and erroneously spelled Cade as "Cates." (See Petition for Writ of Certiorari, App. 4-5).

several grounds the possibility that the State would seek to introduce evidence against one defendant which might not be admissible against the other, and the conflict that would arise if one defendant elected to testify while the other did not. The trial court reasoned that as long as the State intended to introduce eye-witness testimony placing both defendants at the scene of the alleged crime, then separate trials were not warranted. The court did not otherwise inquire as to the details of defense and acknowledged that it did not know of any evidence which would render the defenses of Fortson and respondent antagonistic. Only the prosecutor, Whaley, could have known at that time if any of the then unnamed witnesses would testify to matters which would create a conflict between the defendants.

Four days after the pretrial hearing, Whaley provided a list of potential witnesses containing 144 names and numerous incomplete addresses. Included in this list were the 23 witnesses previously identified in the indictment, as well as the four witnesses who linked respondent to the murder: Fletcher, Cade, Tate and Alphabet. Whaley did not disclose the list of actual witnesses until the weekend before trial. At no time does the record reflect that he disclosed the substance of their expected testimony.

On the morning of the first day of trial, Lewis moved to renew his motion for severance or for appointment of separate counsel to represent one of the defendants. Lewis

explained that his investigation over the preceding weekend had led him to conclude that, unless the defendants were tried separately, matters would arise which would preclude his defense of one defendant without suggesting the other defendant's guilt. Lewis did not give details as to the basis for his conclusion, and the Court did not inquire. Rather, the court again reasoned that if each defendant intended to present a separate alibi defense, then their positions were not antagonistic, and as long as Whaley introduced evidence that both defendants were present at the scene of the crime, no severance was warranted. With specific reference to evidence of prior similar transactions involving one defendant and not the other, the trial court saw no conflict, for Lewis would have to attempt to disprove or rebut each transaction.

Lewis then argued that there were other problems of which the court was not aware because it did not have the benefit of the same information he had obtained over the weekend. The court's response to this argument precluded any detailed explanation of those problems:

> COURT: I hope I don't because then I might be in the position of not being totally fair. No. I try my best not to have the same information counselor. I want to look at it fresh like the jury does.
>
> LEWIS: I don't know anything to do except to come here this morning and tell this court I do not believe ethically, morally, that I should represent both of these men before the same jury.

(T. 14). Despite these representations, after an extended discussion regarding the State's production of exculpatory material and other motions, the trial court refused to grant a continuance and denied the request for appointment of separate counsel.

The only eye-witness testimony describing the murder of Stephen Hynes came from Catherine Moore, and her identification of the defendants was therefore critical evidence. Moore testified that two assailants were involved, although the circumstances were such that her ability to observe and later identify each of them differed dramatically. On the night of the shooting, May 28, 1983, Moore could only describe one assailant, Fortson. Several days later, she failed to identify positively either Fortson or respondent from a photographic array. However, on June 29, 1983, Moore attended a corporal line-up, at which she immediately identified Fortson, the second of eight subjects in the line. Upon further viewing of the participants in that line-up, Moore also identified respondent, who was number six, although one observer testified that Moore may also have mentioned number eight.

Other evidence tending to identify respondent as Fortson's accomplice consisted of testimony from witnesses regarding a number of prior similar transactions. In particular, William Hayes testified that he and his wife were the victims of a robbery earlier in the same evening in which Hynes was killed. Although the two Hayes

assailants had handkerchiefs over their faces from the nose down, Hayes positively identified Fortson at the same corporal line-up Moore attended on June 29. However, Hayes did not identify respondent, and instead identified subject number eight. Nevertheless, at trial Hayes identified both Fortson and respondent as having committed the robbery. On cross-examination of Hayes, Lewis pointed out that Hayes had not identified respondent in the June 29 line-up, but he did not inquire further as to the identity or appearance of subject number eight or suggest the possibility that Fortson had committed the robbery along with someone other than respondent.

In the Hayes robbery, only one of the assailants had carried a gun. Catherine Moore similarly recalled seeing only one gun -- in the hand of Fortson, the first man she observed during the incident and the suspect she was best able to identify at the line-up. Later testimony from a forensic expert supported a conclusion that bullets had been fired from two different weapons, and Whaley ultimately argued before the jury that both Fortson and respondent had fired a shot killing Stephen Hynes. However, the only evidence specifically linking respondent to a gun appeared in the testimony of Calvin Fletcher, Gwendolyn Cade, James Tate and Tony Alphabet.

Fletcher testified that soon after the Hynes murder he learned through a relative of Fortson that Fortson may have been involved in the incident and that Fortson himself had

been shot in the leg. Seeking a $10,000 reward, Fletcher contacted police investigators and told them his belief that Fortson had been involved. Fletcher further testified that he later had two discussions with Fortson in which Fortson admitted being present along with respondent when Hynes was killed. According to Fletcher, Fortson stated that "Henry" -- implying Henry Hamilton, the respondent -- "shot him [Hynes] in the back twice." (T. 728, 730). This was the only evidence linking respondent by name to the possession of a weapon at the scene of the crime, and it was the only evidence specifically blaming respondent for the shooting of Stephen Hynes. Lewis did not object on respondent's behalf to Fortson's out-of-court statements on the ground that they were inadmissible hearsay.

Comparable statements were later introduced through Cade and Tate, who claimed they saw Fortson on the weekend of the shooting and Fortson had said that "his cousin had shot him [Fortson]" in the leg. (T. 790, 803).[2] Near the end of the trial, as part of the State's rebuttal evidence, Alphabet likewise testified that Fortson said "he had been shot by his cousin." (T. 1392). Notably, the

---

[2]The opinion of the Court of Appeals below focused on the double hearsay testimony of Cade and Tate relating statements by Yolanda Cudger, to which Lewis effectively objected. (See Petition for Writ of Certiorari, App. 5). However, with prompting by the prosecutor, both Cade and Tate testified that Fortson told each of them directly that respondent had shot Fortson in the leg. (T. 790, 803).

testimony of Cade, Tate and Alphabet did not necessarily place respondent at the scene of the Hynes shooting, as did Fletcher's testimony, but merely suggested that a cousin (perhaps not even respondent) had shot Fortson. Lewis did not cross-examine any of these witnesses on any of these points, nor did he object to their testimony of statements by Fortson as inadmissible hearsay.

The testimony of Fletcher, Cade, Tate and Alphabet was extremely important to the State's case against respondent, for without it the only evidence suggesting that respondent had been present when Hynes was killed was Moore's less than immediate identification of respondent at the June 29 line-up and the even less conclusive evidence of similar transactions.[3] In addition, while the forensic expert had identified bullets from two weapons, Moore had seen only one gun, and she identified Fortson as having possessed it. The testimony of Fletcher, Cade, Tate and Alphabet therefore offered critical support for an inference that respondent had been present and armed when Hynes was killed.

---

[3]On direct appeal, the Georgia Supreme Court stated that respondent's involvement had also been shown through physical evidence, such as blood and hair samples found at the scene of the crime. Hamilton v. State, 255 Ga. 468, 469, 339 S.E.2d 707 (1986). The opinion of the Court of Appeals below repeated this statement. (See Petition for Writ of Certiorari, App. 2, n.1). In fact, although these samples were taken and studied by the State's forensic laboratory, no such evidence was introduced.

Following the testimony of these witnesses, Lewis again moved "for severance for counsel for these two defendants," arguing as follows:

> It has been a concern of mine from the beginning of the case, after we had investigated what we thought might be the evidence, and now that the State has put on its case, in view of these blurted out statements by Gwendolyn Cade and James Tate and Calvin Fletcher, that Mike Fortson told me Henry shot him; Mike Fortson told me that Henry shot Mr. Hynes; there is simply no way that one attorney can represent both these defendants properly.

(T. 871). Lewis further pointed out the conflict that would arise if respondent wanted him to cross-examine Fortson, "because it appears that the entire State's case against [respondent] is piggy backed on these alleged statements made by Mr. Fortson." (T. 871). Lewis then stated that respondent "has expressed a desire for separate counsel," and suggested that a public defender be appointed to represent respondent, even though it would require a mistrial and continuance so that the public defender could have time to investigate the case. (T. 871-72).

In response, Whaley argued that in a pretrial hearing (of which there is no transcript) both defendants had waived any conflicts of interest. He further noted that Lewis had failed to raise a hearsay objection, and that if an objection had been made Whaley would have argued that the testimony was admissible under a conspiracy theory (even though no conspiracy had been alleged). Lewis replied that if the record reflected a prior waiver of the right to separate counsel, then the waiver could not have

been with knowledge of the actual conflicts that had arisen at trial, and he explained that he had not objected to the hearsay testimony because, even if the objection were sustained, the testimony had been given and no amount of instruction to the jury would remove the harm.

In response to these arguments, the trial court stated that while it could not presume the defendants had knowledge of everything the State would introduce, it seemed logical to assume that the testimony which they now claimed required severance and separate counsel was information that they had known when they agreed to joint representation. The court further observed that the names of these witnesses were on the list provided to Lewis "during the pretrial stages of this case when [the defendants] were making the waivers and were making the statements they wanted one counsel to represent both of them."[4] (T. 875). The court concluded that in any event the defendants had not been harmed, regardless of whether they had known about this aspect of the State's case against them. Nonetheless, while stating that it had no intention of granting a mistrial and appointing

---

[4]However, unless the "waivers" and "statements" by the defendants occurred after October 21, 1983, when the list of 144 names (including Fletcher, Cade, Tate and Alphabet) was first made available, the trial court was mistaken on this point. As noted previously, no record of a waiver hearing has been found, and it is impossible to know when such a hearing may have been held.

independent counsel, the court ruled that should a need arise to cross-examine the defendants, then it would ask a public defender to consult with one or both of them.

Lewis argued in response to this ruling that the court was not correct to assume the defendants had known in advance of the testimony introduced through these critical witnesses, noting in particular Cade's testimony that she had refused to talk to him at the instruction of the State's investigator, and it was not until the morning before Fletcher's testimony that Lewis had been permitted an attempt to interview him.[5] Lewis argued that if he had been able to interview these witnesses without interference by the State, then the defendants might have been in a position to make a fully informed waiver of the right to separate counsel.

At this point, the trial court again mentioned the possibility of providing a public defender -- Russell Meyer -- to consult with either defendant in the event the other elected to take the stand and testify:

> To that extent and to that extent only, I would consider the possibility of asking Mr.

---

[5]Whaley had stated at the outset of the trial that when he gave Lewis the street address for Fletcher, Fletcher was not in jail. However, the address apparently was not given to Lewis until October 21, 1983, and separate testimony from the investigating officer indicates that Fletcher was in jail at least by June 19, 1983. Thus, Fletcher apparently had been in prison and not at the street address furnished by Whaley. (See Petition for Writ of Certiorari, App. 14, n.5).

> Meyer or somebody from the public defender's office to sit -- in the light of what they can cull from what Mr. Lewis may say, to be able to advise, as best they possibly can, one of these defendants as to whether they might take the stand, whether they might not take the stand. If they do take the stand, what kind of cross-examination they might be subject to by both the State and Mr. Lewis if it comes to that; if their positions become totally contradictory.

(T. 878). Thus, the trial court ultimately did consider the possibility that one defendant might be subject to cross-examination by both the State and Lewis, but it clearly did not recognize a need for separate counsel unless the positions of the defendants became "totally contradictory."

Purely as a cautionary matter, therefore, the trial court requested Meyer to join the proceedings, even though he had only limited knowledge of the case based on newspaper accounts and general courthouse gossip. In fact, it was not until after the State had rested its case and the defense had called several witnesses that Meyer appeared. He was instructed to assist whichever defendant Lewis felt might have a problem in the event one chose to testify.

After introducing a series of witnesses for the defense, Lewis called Fortson to the stand. Fortson testified consistent with the testimony of other witnesses in support of his alibi defense. Neither Lewis nor Meyer attempted to cross-examine Fortson on respondent's behalf.

Following Fortson's testimony, the trial court asked Lewis whether he intended to put respondent on the stand.

When Lewis announced that respondent would testify, the court asked whether it was still necessary that Meyer remain in the courtroom to assist. Lewis responded that Meyer's presence had not solved the problem, but the court replied that the issue would be one for appeal. The court again explained that the reason Meyer had been requested to appear was so that, if Lewis decided not to call respondent, then respondent could still consult with another attorney regarding whether to testify. Since Lewis had indicated that respondent would testify, the court saw no further reason to have Meyer present. Lewis then made it clear that respondent wanted to testify and wanted to consult with Lewis in the absence of severance. Meyer was excused, and respondent took the stand and testified to an alibi defense.

In closing arguments before the jury, with reference to the June 29 cprporal line-up and Moore's identification of the defendants, Lewis stated that everything he said was on behalf of both defendants, but that he did not intend to lump them together and he was not acknowledging anything on behalf of either of them by grouping them together. Lewis did not, however, emphasize the different degrees of certainty in Moore's identification of the defendants, or suggest that respondent might not have been Fortson's accomplice. By contrast, Whaley argued in closing that Moore had positively identified both defendants, that both

had carried guns, and that both had shot Stephen Hynes. The jury found both defendants guilty of felony murder.

## ARGUMENT AND CITATIONS OF AUTHORITY

I. DETERMINING WHETHER JOINT REPRESENTATION WAS IMPROPERLY REQUIRED OVER TIMELY OBJECTION PRESENTS A FACT-SPECIFIC INQUIRY, AND THEREFORE ANY ATTEMPT TO FORMULATE A CONSTITUTIONALLY MANDATED TEST FOR EVERY CASE WOULD BE INAPPROPRIATE, IF NOT IMPOSSIBLE.

Because of conflicts of interest in representing both Fortson and respondent, Lewis failed to object to the hearsay testimony of Fletcher, Cade, Tate and Alphabet as to statements Fortson made to each of them implicating respondent in the murder of Stephen Hynes. Moreover, when Fortson took the stand to testify in his own defense, Lewis was unable both to conduct direct examination on Fortson's behalf and then to cross-examine Fortson on respondent's behalf. These precise conflicts were addressed by this Court in Glasser v. United States, 315 U.S. 60 (1941), and Holloway v. Arkansas, 435 U.S. 475 (1978), respectively. In both cases, prejudice to the convicted defendant was presumed and the reversal of his conviction was automatic. See Glasser, 315 U.S. at 73, 75-76; Holloway, 435 U.S. at 477-78, 488-91. The Court in Cuyler v. Sullivan, 446 U.S. 335 (1980), did not overrule either of those decisions, and the arguments set forth in the present petition do not request such a result. Unchallenged precedent therefore fully supports the decision of the Court of Appeals below, and the petition for writ of certiorari should be denied.

Nonetheless, in the first question presented, petitioner requests this Court to define a test for determining whether joint representation has been improperly required, quoting the Court's description in Holloway of its holding in Glasser that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." Holloway, 435 U.S. at 488. In other words, petitioner is requesting that the Court define a specific inquiry for state courts to follow in future cases in order to satisfy the Holloway duty to take adequate steps to ascertain whether the risk of conflicts of interests between jointly represented defendants warrants the appointment of separate counsel. Id. at 484.

Such a test, however, is by definition fact-specific. The types of possible conflicts are numerous, and no litany of warnings or questions prescribed by this Court will necessarily ensure conflict-free representation in every case. State courts and lower federal courts are fully capable of reviewing claims for ineffective assistance based on alleged conflicts in joint representation, and petitioner has identified no split of authority among the rulings by these courts to date. Simply put, petitioner has demonstrated no compelling need for this Court to define a Constitutional test to apply in every case for determining whether joint representation is improper.

Yet even if this Court were to undertake to define the scope of inquiry required in every case to assess the risks of conflict in joint representation, the result in the present case surely would not differ because the trial court refused to conduct any meaningful inquiry. In fact, the trial court completely disclaimed any desire to learn the factual basis for the conflict of interest Lewis asserted on the first day of trial. The court insisted that it "look at it fresh like the jury does." (T. 14).

By then, however, the precise conflicts previously recognized by this Court in Glasser and Holloway were all too apparent despite the trial court's decidedly narrow view of the matter. The trial court saw no conflict so long as Fortson and respondent introduced separate alibi defenses which themselves did not conflict. However, the existence of separate alibi defenses does not preclude a finding that one defendant can benefit from suggesting that the other defendant is lying. This strategy may even become an absolute necessity where testimony has been admitted describing the other defendant's out-of-court statement that the first defendant had committed the crime. Respondent submits that conflicts of interest such as these raise issues far more complex and encompassing than simply whether alibi defenses are factually inconsistent. This was the precise lesson of Holloway, in which each defendant offered a separate alibi defense. 435 U.S. at 486.

Moreover, even if the trial court had conducted an inquiry on the first day of trial in this case, it is not likely that the actual conflicts which later arose from the testimony of Fletcher, Cade, Tate and Alphabet would have been identified. While petitioner suggests that the trial court viewed the motion for separate counsel as a "stalling tactic," (Petition for Writ of Certiorari, p. 8), nothing in the record suggests that Lewis was not being entirely candid when he represented to the court that a conflict existed and that he had only learned of the conflict during the weekend before trial. Indeed, if blame is to be placed on any participant in the proceeding for the problem of having to deal with conflicts of interests on the first day of trial, that blame should be laid at the feet of the prosecutor. Whaley must have known long before trial that Fletcher, Cade, Tate and Alphabet would testify and would relate Fortson's out-of-court statements implicating respondent. Yet Whaley never notified the trial court or Lewis of the specific conflict this testimony would create.

To the contrary, it appears that Whaley consistently resisted divulging this information. The State failed to provide Lewis with a correct address for Fletcher following his imprisonment and refused to allow Lewis to interview Fletcher either before trial or outside the presence of Whaley and the State's investigator. Lewis therefore did not learn of Fletcher's testimony until Fletcher actually

took the stand. Moreover, the State should be presumed accountable for Lewis' inability to discover the substance of Cade's testimony before trial, for she followed the specific instruction of the State's investigator and refused to discuss the case with anyone, including Lewis. Accordingly, the Court of Appeals below specifically found that any delay in the objection by Lewis to joint representation was caused by Whaley's delay in providing evidence to the defense and/or the inadequacy of the information provided. (Petition for Writ of Certiorari, App. 14).

For these reasons, respondent submits that the present case does not warrant further review in this Court. No attempt to prescribe a Constitutionally mandated inquiry will cover the possibilities for conflict in every case, and whatever inquiry might be required in future cases would not alter the result in the present case. Therefore the petition for writ of certiorari should be denied.

II. EVEN IF THE COURT HELD THAT THE ACTUAL CONFLICT/ADVERSE IMPACT TEST MUST BE APPLIED IN EVERY CASE TO DETERMINE IF JOINT REPRESENTATION WAS IMPROPERLY REQUIRED, THE RESULT IN THIS CASE WOULD NOT DIFFER.

As an alternative question presented for review by this Court, the petition suggests that the actual conflict/adverse impact test announced in Cuyler v. Sullivan, 446 U.S. 335 (1980), should apply to all cases of joint representation and not simply to those in which no

objection was raised at trial. The Court of Appeals below has interpreted Cuyler to apply only where no objection was raised, (Petition for Writ of Certiorari, App. 10); see Duncan v. Alabama, 881 F.2d 1013, 1017 n.5 (11th Cir. 1989), and petitioner has located no contrary decision creating a split of authority as to the intended application of the Cuyler test.

Nevertheless, even if the Cuyler test were held to apply to every case, respondent submits that the test is readily satisfied here. Indeed, respondent notes that the Court in Cuyler cited Glasser as an example of an actual conflict of interest which adversely affected trial counsel's performance. See Cuyler, 446 U.S. at 348-49. The Cuyler Court recalled that the defense counsel in Glasser failed to object to hearsay testimony from a State witness that linked Glasser with the crime, because of a desire to diminish the jury's perception of a co-defendant's guilt. Id.

Similarly, Lewis did not object on behalf of respondent to Fletcher's testimony that Fortson had stated respondent killed Stephen Hynes and accidentally shot Fortson. This testimony was not objectionable as to Fortson, since it was his own statement and was an admission against his interest, but the testimony was clearly objectionable as to respondent. Yet if Lewis had objected only on respondent's behalf, he would have risked leaving the jury with the impression that the testimony was

true as to Fortson. This is precisely the problem addressed in Glasser. See 315 U.S. at 73-74. Although Fortson's alleged statement was inadmissible against respondent, it was the only evidence linking respondent by name to the possession of a weapon at the scene of the crime or to the actual shooting of Stephen Hynes.

In addition, Lewis did not attempt to cross-examine Fletcher as to the truth of Fortson's statement or possible motives for Fortson or Fletcher to lie on this point. Nor could Lewis call Fortson as a witness and cross-examine him on these matters without creating a conflict. Lewis did not explore the possibility that Fortson feared an arrest on intentional murder charges and sought to blame someone else for the actual shooting. Lewis' inability to cross-examine Fortson on respondent's behalf represents the same conflict of interest recognized in Holloway, and respondent submits that it, too, satisfies even the Cuyler test for ineffective assistance of counsel. See Cuyler, 446 U.S. at 349-50.

Moreover, Lewis did not attempt to cross-examine Cade, Tate or Alphabet regarding their testimony that Fortson had said he was shot in the leg by his cousin. Lewis did not suggest on respondent's behalf that some other cousin had accompanied Fortson during the robbery attempt and Fortson was attempting to protect that person while implicating respondent. Nor did Lewis suggest that respondent may have justifiably shot Fortson in an unrelated incident.

Further, Lewis failed to emphasize during his cross-examination of Catherine Moore the distinct differences of conviction in her identifications of Fortson and respondent. At a pretrial hearing on the defendants' motion to suppress evidence of Moore's identifications during the June 29 corporal line-up, Moore had testified in considerable detail as to her basis for identifying Fortson, including references to several specific facial features of Fortson. She was notably less specific in explaining her basis for identifying respondent. Lewis did not suggest during his cross-examination of Moore at trial that while Fortson may well have been involved in the crime, respondent had not been. Similarly, Lewis did not emphasize during his cross-examination of Hayes, the victim of an earlier robbery on the night that Hynes was killed, that Hayes had also positively identified Fortson during the June 29 line-up but had failed to identify respondent and had identified someone else. Lewis did not attempt to suggest that Hayes' identification of respondent at trial might simply have been based on the fact that he was convinced Fortson had committed the crime in the company of another assailant. Finally, in closing argument Lewis did not emphasize the differing degrees of certainty in this identification testimony, nor did he otherwise suggest that while Fortson may have committed the alleged crime, reasonable doubts remained as to respondent's involvement.

For these reasons, even under the Cuyler standard respondent has demonstrated that conflicts of interest existed which adversely affected the performance of his trial counsel. Indeed, as an alternative holding, the Court of Appeals below specifically found that the Cuyler standard was satisfied in this case. (Petition for Writ of Certiorari, at p. 15, n.6). Respondent submits that this finding was correct, and therefore the petition for writ of certiorari should be denied.

III. WHETHER A COURT OF APPEALS MAY CONDITIONALLY GRANT A PETITION FOR WRIT OF HABEAS CORPUS AND REQUIRE THE COMMENCEMENT OF A RETRIAL WITHIN 90 DAYS OF THE DATE OF THE COURT'S OPINION PRESENTS AN ISSUE NOT DECIDED IN THE COURT BELOW.

Respondent argued before the Court of Appeals below that his petition for writ of habeas corpus should be granted and he should be released unless the State of Georgia saw fit to retry him within a reasonable period of time, not to exceed 90 days. In support of this request, respondent cited Gray v. Estelle, 616 F.2d 801, 805 (5th Cir. 1980), in which the Court of Appeals issued a ruling requiring the State of Texas to retry a petitioner within 90 days of the issuance of the court's mandate. In the present case, the Court of Appeals provided that the 90-day period would begin running from the date of its opinion.

Petitioner's motion to stay the running of that 90-day period was not ruled upon by the Court of Appeals below. Instead, petitioner delayed issuance of that court's

mandate by filing a motion for rehearing and suggestion of rehearing en banc. Petitioner then sought and obtained a stay of the court's mandate through January 20, 1993, five months after the date of the opinion. Upon the filing of the petition for writ of certiorari, that stay extended automatically until this Court rules on the petition.

Because the mandate of the Court of Appeals has not yet issued, jurisdiction over the case has not been remanded to the district court and no order releasing respondent has been entered. In the interim, the Court of Appeals may or may not rule on the motion to stay the running of the 90-day retrial period (although respondent notes that the period has already expired). Moreover, it may be that on remand following this Court's denial of the petition for writ of certiorari the State will forego a retrial altogether. For these reasons, respondent submits that the legal consequence of the State's failure to retry respondent within 90 days of the opinion of the Court of Appeals has not been decided below and may never become an issue in this case. Therefore, granting certiorari to decide the third question presented in the petition would be premature.

## CONCLUSION

Respondent respectfully submits that the petition for writ of certiorari should be denied with respect to each question presented.

Henry Hamilton

Of Counsel:

Glen M. Darbyshire
HUNTER, MACLEAN, EXLEY &
DUNN, P.C.
Post Office Box 9848
Savannah, Georgia 31412-0048
(912) 236-0261